

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**Docket No. 2009-144-C**

IN RE:	)	
Application of TracFone Wireless, Incorporated	)	
For Designation as an Eligible Telecommunications	)	
Carrier in the State of South Carolina for the	)	REPLY BRIEF
Limited Purpose of Offering Lifeline Service	)	
to Qualified Households	)	

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The South Carolina Office of Regulatory Staff (“ORS”) hereby respectfully submits this Reply Brief in response to TracFone Wireless, Inc.’s (“TracFone” or “the Company”) Legal Memorandum in Support of Rebuttal Testimony of F. J. Pollack attached as Exhibit 1 to Mr. Pollack’s testimony (“Memorandum”) and filed with the Public Service Commission of South Carolina (“Commission”) on July 30, 2009 in this matter.

**ARGUMENT**

**I. The Commission has statutory authority to require TracFone, a Commercial Mobile Radio Service (“CMRS”) provider, to contribute to the South Carolina Universal Service Fund (“State USF”).**

ORS asserts that the Commission has clear and express authority to require TracFone, if designated as an eligible telecommunications carrier (“ETC”) in the State of South Carolina, to contribute to the State USF just as all other wireline and wireless ETCs in the state contribute to the State USF.

TracFone relies heavily on the argument that it does not provide “radio-based local exchange services”, and that it is a CMRS provider and therefore is not subject to Section

58-9-280(E)(3). However, TracFone's argument is belied by the very fact that TracFone filed the instant application for ETC status pursuant to Section 58-11-100. (See page 1 of TracFone's application, first sentence). Chapter 11 of Title 58 is entitled "**Radio Common Carriers**" (emphasis added). ORS respectfully submits that TracFone recognized when it filed its application for ETC status that it is a "radio common carrier" under South Carolina state law and thus correctly cited this statutory provision. Additionally, TracFone's Memorandum completely overlooks the provisions of S.C. Code Ann. Section 58-11-100 (Supp. 2008) which are described more fully below.

Section 58-9-280(E)(3) is intended to apply to companies providing radio-based local exchange services. The term "radio-based" is meant to be broadly interpreted to capture those companies that are offering wireless voice services in competition with local telecommunications services. This is made even clearer when viewed in conjunction with Section 58-11-100.

Section 58-11-100 specifically references "commercial mobile service providers"<sup>1</sup> and ties back to Section 58-9-280 (E)(3). The General Assembly *expressly* retained Commission jurisdiction over requiring radio common carriers (including commercial mobile service providers) to contribute to the State USF. (See Section 58-11-100(C)). The General Assembly further provided this Commission with the ability to require radio common carriers and/or commercial mobile service providers that seek and obtain ETC or Carrier of Last Resort ("COLR") designation to comply with the same rules, requirements, or standards that are generally applicable to carriers that are subject to alternative regulation under Section 58-9-576 and that operate as eligible telecommunications carriers

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<sup>1</sup> TracFone acknowledges on page 10 of its Memorandum that it provides "Commercial Mobile Service" as that term is defined by the Federal Communications Act.

or as carriers of last resort. Both wireline and wireless ETCs contribute to the State USF in accordance with the Commission's Order 2001-419 at ¶ 15 and reaffirmed in Order No. 2008-672.

In footnote 15 on page 6 of the Company's Memorandum, TracFone argues that nowhere in Section 58-9-280(E)(3) does the term "wireless services" appear and that the Commission "misconstrued" the statute. The Commission did not misconstrue Section 58-9-280(E)(3). Section 58-11-100 entitled "Certificate of public convenience as prerequisite to construction or operation of system; **applicability to commercial mobile service providers**" (emphasis added) directly addresses providers of commercial mobile services and provides that the Commission's jurisdiction to require contribution to the State USF is unaffected. The General Assembly intended subsection (C) and (E) of Section 58-11-100 to provide the Commission the jurisdiction to regulate commercial mobile services providers that are ETCs or COLRs in the same manner as other ETCs and COLRs and ensured that the Commission retained authority to require said commercial mobile service providers to contribute to the State USF if the Commission finds that they are competing with local telecommunications service providers in the State.

Finally, to adopt TracFone's interpretation of Section 58-9-280(E)(3) would lead to an absurd result. If we accept *arguendo* that "radio-based" providers are not wireless carriers/CMRS providers, then what companies, if any, would be competing with the existing wireline telecommunications service providers in the state? Or does it make more sense that the General Assembly meant to include cellular/wireless providers as providers of radio-based services. Certainly, Section 58-11-100 clarifies that the General Assembly

classifies “commercial mobile service providers” as a type of “Radio Common Carrier” – otherwise, that term would not be included in Chapter 11 of Title 58.

## **II. The Primary Purpose of Senate Bill 464 Was to Provide for a Statewide Broadband Network**

The Honorable South Carolina Senator Richie among others sought to broaden the services supported by the State USF to include funding for a broadband deployment incentive program; provide incentive funding for schools to issue laptops; and provide continued support for low-income telephone subscribers through Lifeline and Link-Up programs. S.464 if enacted would have required all wireless carriers<sup>2</sup> (not just those designated as ETCs or COLRs) to contribute to the State USF. S.464 would have required any person or entity providing telephone, voice over internet protocol, or any other voice replacement service to contribute to the State USF. For the Commission’s convenience, S.464 is included as Attachment One to this Reply Brief.

TracFone argues that because S.464, which would have required *all* wireless carriers to contribute to the State USF, did not pass, Section 58-9-280 (E)(3) does not provide the Commission with the authority to require wireless carriers to contribute to the State USF. This assertion is a red herring. Certainly, S.464 would have taken away the *requirement* that the Commission first determine that radio common carriers (or commercial mobile service providers) are providing services in competition with local telecommunications services. If S.464 had been enacted, regardless of whether the wireless/radio-based services are in competition with local telecommunications services,

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<sup>2</sup> On page 6 of its Memorandum TracFone mistakenly asserts that ORS is taking the position that all wireless carriers must contribute to the State USF. Consistent with the Commission’s Order No. 2001-419, only those wireless carriers that seek ETC or COLR designation would be required to contribute to the State USF.

contributions to the State USF would have been required of any provider of voice replacement services.

The Commission did not need S.464 to pass to require commercial mobile service providers, radio common carriers, or “radio-based” local exchange services that compete with local telecommunications service to contribute to the State USF. Again, TracFone completely bypasses Section 58-11-100 (which is applicable to commercial mobile service providers). Section 58-11-100 expressly retains the Commission’s jurisdiction to require companies providing radio-based local exchange services in competition with local telecommunications service to contribute to the State USF and allows the Commission to require “commercial mobile service providers” that become ETCs or COLRs to be subject to the same rules, requirements or standards as other ETCs or COLRs.

**III. Permitting TracFone to Obtain ETC Status Without Paying Into the State USF Would Be Discriminatory and Would Provide TracFone An Unfair Advantage Over Other ETCs and COLRs.**

TracFone seeks special treatment. Today, pursuant to the Commission’s orders which have been previously referenced in this brief, both wireline and wireless ETCs and COLRs contribute to the State USF. To allow TracFone to obtain ETC status, without requiring it to contribute to the State USF, while still requiring the other ETCs and COLRs (both wireline and wireless) to contribute puts those companies at a distinct competitive disadvantage to TracFone. TracFone acknowledges that it will be competing with other carriers offering telecommunications services. (*See* TracFone Application at pages 19; 21). The other wireless carriers designated as ETCs by this Commission are also CMRS providers, and they are required to contribute to the State USF. (*See* Applications and

testimony of Hargray Wireless, LLC in Docket No. 2007-223-C and FTC Communications, Inc. d/b/a FTC Wireless, Docket No. 2007-293-C).

TracFone, on page 12 of its Memorandum, argues that it is “not eligible to receive the \$3.50 per month” from the State USF. And yet, on page 5, TracFone quotes portions of Commission Order No. 2001-419 wherein the Commission held that if a wireless carrier seeks COLR *or* ETC status such application would be a declaration of that carrier’s intent to offer service in competition with local telecommunications services provided in the State. In this order, cited by TracFone, the Commission has indicated that a wireless carrier could file for COLR status. TracFone is not required to provide the entire “\$3.50 of additional Lifeline support per customer per month from its own resources”; that is TracFone’s choice. TracFone could also choose to seek COLR status, but it has not.

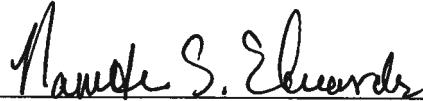
Finally, TracFone makes the claim that requiring it to pay into the State Universal Service fund would “result in a double payment to support State universal service.” (Legal Memorandum, page 4, lines 10-11). In fact, SafeLink Wireless is a subsidized “free” service, and no revenue will be generated. Thus, there is no double payment to support state universal service.

#### **IV. Conclusion**

TracFone is playing a game of semantics in order to receive special dispensation from the Commission. TracFone wants ETC status in South Carolina but is unwilling to abide by the same rules, requirements and standards that apply to other ETCs and COLRs (wireline and wireless). This Commission should reject TracFone’s arguments as a transparent effort to avoid paying into the State USF and as bid to gain an unfair competitive advantage over other ETCs/COLRs. The state legislature made itself clear

when it modified Section 58-11-100 to include “commercial mobile service providers” and ensured that the Commission’s jurisdiction conferred by Section 58-9-280(E)(3) remained unaffected.

Respectfully submitted,

A handwritten signature in black ink, reading "Nanette S. Edwards", is written over a horizontal line.

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August 21, 2009  
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**CERTIFICATE OF  
SERVICE**

This is to certify that I, Pamela J. McMullan, have this date served one (1) copy of the **Reply Brief** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

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August 21, 2009  
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